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Abstract

Consultation of interests is often seen as a source of both input and output legitimacy. However, consultation only strengthens output legitimacy if it leads to improvements in legislative proposals. This detailed study of consultation reports in Denmark – chosen as a most-likely case when it comes to consultation having an effect on the substance of laws – shows a major difference in the amenability of different governmental branches but that, in general, the authorities do not listen much despite a strong tradition of consultation. This risks jeopardising the transfer of knowledge from societal actors to administrations, thus having a detrimental effect on the potential that consultation has to strengthen output legitimacy.

Introduction

The writing of laws is a never-ending quest for effectiveness and legitimacy. Many a route has been designed to enable in such a direction, and one of the paths most commonly taken is that of public consultation, i.e. inviting organised interests and civil society to comment on ideas or even drafts of laws before they are presented as actual proposed legislation before an assembly.

Consultation can take many forms and two reasons for openness can be emphasised: the organised interests provide information about the interests of societal actors and they provide expert knowledge to the policy process (Bouwen, 2002). Consultation is thus a mechanism that serves a double role in modern demo- and technocracies: it seeks to enhance both input and output legitimacy. A prerequisite for consultation to fulfil the second of those two roles, however, is that it is effective, that it actually adds something. This paper therefore asks this question: does consultation lead to changes in draft laws?

To address this question, the paper is structured into five sections. The first explains the theoretical basis for the research question. There is subsequently a clarification of the strategy to examine this conundrum, namely an in-depth analysis of the consultation system in Denmark, chosen as a strategically most-likely case when it comes to administrative amenability following consultation. The third section details the method of analysing amenability through an examination of consultation reports from Danish government ministries to the Danish Parliament, and the fourth presents the results from this four-step analysis. Finally, there is a concluding section.

Output legitimacy and consultation

It is always interesting to investigate sources of output legitimacy. Can they live up to what they promise? What are the preconditions for the mechanisms designed

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to enhance the effectiveness of legislation? One such precondition is studied in this paper, namely amenability as a precondition for consultation to be the source of output legitimacy. The following three subsections clarify the theoretical basis of this question. The first addresses the general question of output vs. input legitimacy and consultation as a potential source of output legitimacy. This discussion leads to some comments on meta-regulation and the traditional studies of consultation. Lastly, I highlight the scope of the theoretical lens established.

Output legitimacy vs. input legitimacy

Discussions of legitimacy are often closely linked to discussions of democracy and representation. Who has access and who gets their way? Are certain societal interests more influential than others? Are there structural biases that prevent a channel of legitimacy from reaching its full potential? The questions are manifold and complex.

Output legitimacy offers another perspective. Traditionally, it is defined as legitimacy resting on policies that ‘effectively promote the common welfare of the constituency in question’ (Scharpf, 1999: 7), i.e. effective and efficient political deliverance of, say, prosperity, security and the like.¹ This distinction between input and output legitimacy is well acknowledged in multi-level, *in casu* European, studies (Bang, Jensen, & Nedergaard, 2015; Beetham & Lord, 1998; Majone, 1996, 1999; Scharpf, 1999, 2009), however the insights cannot be solely restricted to multi-level settings. Majone (1994, 1996, 1999), for instance, introduces the concept of the regulatory state in more broad terms than those limited simply to a multi-level purpose alone, and that concept and its relationship to output legitimacy has been used to inform empirical research at a national level (Pedersen, Ravn, & Christensen, 2016).

Despite this relevance of the distinction between input/output legitimacy – including at the national level – studies that focus on the output dimension are rare. The scholarly research on topics such as democratic representation and power seems to have crowded out interest in whether or not policies (can) deliver (Pedersen, 2015, 2016b). And, as a consequence, it is also hard to find studies that focus on the effective functioning of the sources used to strengthen output legitimacy.

Consultation is one of the most commonly used mechanisms that have been established to achieve effective legislation and thus output legitimacy. Investigations into institutions that perform consultation can thus become investigations of an important source of output legitimacy. Clearly, an examination of consultation is not an investigation of output legitimacy as such; it can only amount to an assessment of the preconditions for the effective functioning of a potential source of output legitimacy; but this does not rob it of its relevance.

The traditional view on consultation: meta-regulation and interest groups

Admittedly, in the world of regulatory studies, there is a rich tradition of examining the mechanisms that seek heighten output legitimacy, including consultation.

This tradition, however, is hampered by two challenges, which this study addresses. First of all, many regulatory studies exclude explicit attempts to theorise about or analyse the preconditions for these meta-regulatory mechanisms to meet their ambitions and the degree to which these preconditions are met. Instead, the tradition focuses on the tools as instances of regulating regulation – meta-regulation – rather than their effective functioning. Not least the impressive scholarship of Claudio Radaelli (see, for instance, Radaelli, 2004, 2005; Radaelli & de Francesco, 2007, 2010; Radaelli & Meuwese, 2009) has added much in this regard. Second, despite consultation being an important and widely used tool to ensure policy learning, effective functioning of rules, regulatory quality and the like – all potentially supporting output legitimacy – it has not been sufficiently studied on its own terms. Instead, much research focuses on areas such as impact assessments (*e.g.* Munday, 2008; Radaelli, 2009; Torriti, 2007).

The literature on the influence of interest groups (*e.g.* Dür, 2008b, 2008a; Klüver, 2009; Lowery, 2013; Michalowitz, 2007) is perhaps what comes closest to studying the functioning of consultation. However, this literature is preoccupied with the advice of interest groups as an input factor – are representatives of certain interests more powerful than others? – rather than consultation as a potential source of effective and efficient rules and thus potentially of output legitimacy (Pedersen, 2016c). A framing in terms of influence and representation is also found in studies similar to this one (Binderkrantz, Christiansen, & Pedersen, 2014). Moreover, as the complex studies such as the ones previously mentioned make perfectly clear, studying influence is much, much broader than studying consultation alone.

Narrowing the scope of the investigation

As the studies referred to above emphasise, consultation is clearly a factor of input legitimacy. But among practitioners, a strong argument in support of consultation is often one of output legitimacy. Consultation has a double function, it seems.

However, the ways in which consultation lifts these two tasks – adding to input and output legitimacy respectively – are profoundly different from one another. Consultation adds to input legitimacy as it is a source of inclusion. From this it follows that consultation adds to input legitimacy even if we disregard the impact that consultation has on laws. The opposite is true when it comes to output legitimacy. Consultation adds output legitimacy when it assists in making laws more efficient and effective. And it can only do so if the expert knowledge stemming from the practical experience of regulatees and other interests revealed in the process of consultation is actually put to use in the further drafting of bills.

This is the background on which this article asks its previously presented research question: Does consultation lead to the alteration of bills? If consultation is to add to output legitimacy – as is a purpose hereof – consultation must be used to strengthen the bills proposed. Otherwise, we need to reframe consultation as merely a practice of input legitimacy and as a bureaucratic scheme rather than as a factor adding anything to legislation. And this would probably leave

many interests groups uninterested in participating and thereby also distort how consultation functions as a factor of input legitimacy.

Is amenability in consultations thus an operationalisation of ‘output legitimacy’? No, it is not. And can it be that consultation does not deliver on its potential as a source of output legitimacy and in general does not ensure more effective regulation at all? Yes, it can. However, these broad questions are not the focus here. As stated above, amenability at some level is a necessary precondition for consultation to be an effective source of output legitimacy – but output legitimacy does not follow causally from amenability. What is studied here, then, is one specific precondition for consultation to have a function as a source of output legitimacy – not output legitimacy itself. Such a study would have a much broader socio-economic scope than the textual analysis of consultation documents presented below.

To sum up, output legitimacy is seldom used to frame and direct studies, and studying the preconditions for effective functioning of the tools included to strengthen output legitimacy is relevant in that respect, and an amenability study is a good place to start. It is on this theoretical background that the section below presents the analytical strategy and the case selection of the following investigations.

Empirical background and case selection: Why is Denmark an interesting case

Despite the fact that use of consultation is widespread in the OECD and EU countries (Radaelli & de Francesco, 2007: 29), the exact methods vary as do interest mediation systems in general (Berger, 1981; Heinze, 2009; Rommetvedt *et al.*, 2013; Streeck, 2003). Consultation is often part of a regulatory impact assessment system (*e.g.* in the EU, see Radaelli, 2007b: 197) and as with these, systems of consultation vary in both form and timing. How, then, is it possible to achieve any sort of answer to the question of administrative amenability? The path chosen here is that of a strategic case study: ‘The strategic choice of case may greatly add to the generalizability of a case study’ as Flyvbjerg (2006: 226) notes. This section, therefore, presents the empirical background of the study to underpin the strategic choice of Denmark as a relevant case.

Denmark is renowned for its openness in the legislative process and it is a country with a long history of consultation (Radaelli, 2009: 1154). If such an openness and tradition of listening does not lead to amenability among the public authorities, how then should we expect amenability in administrations less prone to input from regulatees and others?

Four aspects of the Danish institution of consultation support this case selection. The first is its legal base, the second its object, the third the range of the consultation in Denmark, and the fourth the salience of the whole system. These four points underpin the impression of a very strong consultation tradition with a potentially strong impact on legislation.

The first aspect is the legal base. The Danish consultation system is widely used: almost all bills are scrutinised through public consultation but despite its apparent strength, this advisory exercise is not mandatory. When drafting a law, the administration has no legal obligation to consult organised interests, other bureaucracies or the public – but they do. The basis of the system is a strong informal norm, which has also spilled over into hard law. Several meta-regulations exist that simply anticipate or assume consultation to have taken place. In the Danish Ministry of Justice’s guide on legal quality, for instance, it is stated that ‘clarity over the attitudes of consulted authorities and organisations etc., which will be affected by a law, is important.’ (Justitsministeriet, 2005: 55; author’s translation). When guiding the other ministries on their legal drafting, the Ministry of Justice simply assumes consultation to have taken place. The Danish parliamentary handbook also stresses the importance of consultation (Folketinget, 1998: chapter 5.5). These two texts are, however, legally non-binding. The only legal document actually emphasising consultation is a prime ministerial decree to the administration from 1998 (Statsministeriet, 1998); and even in this – legally binding – decree, consultations are the object of assumption. Apparently, the legal and administrative norm is so strong that it has yet to be formalised, and this peculiar ‘legal’ base of the Danish consultation system only supports it as a relevant most-likely case when it comes to amenability: if the Danish administration did not have to consult the public, why would it do so, if not for the inclusion of comments from consultation partners in the further drafting of laws?

A second aspect supporting Denmark as a case where one should expect a high degree of amenability, is the object of consultation. Unlike the system in for example the European Union, the Danish consultation system is a late stage-system and is centred on draft legal texts rather than, for instance, surveys or a green- or whitebooks presenting regulatory ideas. This specific system has the advantage of allowing for a separation of political from more technical comments – two not necessarily aligned types of perspectives (Fliedner, 2001). And this separation supports the hypothesis that consultation in Denmark has a strong impact on the legal arrangements: the more specific and the more ‘technical’ a comment is (and these two things are not necessarily the same), the easier they are to comply with.

Third, consultation in Denmark is very broad. Organised interests, other public authorities and the public are all invited to comment on the specific draft legal text before it is presented to Parliament. The system is two-tier. On the one hand, invitations to comment on draft legal texts are sent to specific interest organisations and other public authorities deemed relevant by the administration in charge of the proposal; on the other hand, these documents are made publicly available on a website, www.hoeringsportalen.dk. In sum, the Danish model of consultation is a mix of what the OECD calls ‘Circulation of regulatory proposals for public comment’ and ‘Public notice-and-comment’ (OECD, 2002: 153–154) and this goes for both laws and – albeit to a lesser extent – lower level rules. The dual mechanism allows organised interests, other parts of the public

sector and the public to comment on the draft legal texts. In addition to this, the responsible ministries do not (formally) discriminate between comments on the basis of their origin when writing consultation reports. Every comment is – formally – treated with the same rigour regardless of whether the sender is a public agency, interest organisation, or a private citizen. This breadth of the consultation – especially including other public authorities and allowing for non-assigned organisations to comment – would lead us to think that consultation would have an effect on the draft laws.

Fourth, every consultation is given a deadline but organisations regularly complain that these are too narrow (Pedersen & Christensen, 2013; Pedersen, Christensen & Hansen, 2013). These complaints are given attention both in the media (see for instance Lund, Thomsen & Skjoldan, 2015; McGhie, 2013) and politically (Folketinget, 2010). This also supports the impression of a consultation institution with both political and administrative importance. Following the deadline, the responsible administration goes through every consultation response and eventually adjusts the draft legal text. On that basis the bureaucracy writes a consultation report that summarises the submitted remarks, provides an overview of changes following these comments and explains why certain critiques have not been met.

These specific traits of the Danish consultation system show how it is formally very open to input from outside of the responsible ministry. It might be the case that interest mediation systems in Europe are surprisingly similar (Saurugger, 2007; Schneider, Finke & Baltz, 2007) and that ‘better regulation’ or ‘smart regulation’ policies tend to converge (Baldwin, 2010: 262–263; Radaelli, 2007a: 3). The traits described above, however, are not common and make Denmark an interesting and relevant case to study as they lead us to assume a higher degree of amenability in the Danish government administration than elsewhere.

How high a degree of amenability would we expect? Previous studies are a good place to start when defining expectations. Binderkrantz *et al.* (2014: 886) found that 47 per cent of ‘group responses resulted in full or partial accommodation by the ministry’. To this author, this seems as a rather high degree of amenability – or at least one that is not congruent with the regular complaints from Danish interest groups that ‘consultations are a waste of time’ (see, for instance, Winther, 2016). Considering Denmark as a most-likely case, however, it is not unreasonable to expect an amenability degree such as the 47 per cent suggested in the literature.

How to analyse amenability

Traditional studies of influence (Binderkrantz *et al.*, 2014; Dür, 2008a; Klüver, 2011) often aim at identifying ‘winners’ and ‘losers’ among different interest groups. This is relevant from an input perspective. From an output perspective, it is not important who gets their way. If the consultation system is to be of any use, it must spur legal improvements; who gave the advice leading to those improvements is not relevant. The method described below therefore aims at study-

ing the extent and nature of such legal improvements rather than identifying influence or specific groups.

Luckily, we have a data source of the legal changes instigated by consultation. In Denmark, the consultation exercise is followed up by a consultation report. This report accompanies the legislative proposal as an annex when sent from the responsible ministries to Parliament. A range of mandatory 'legislative remarks' are included as another annex to the bill; these remarks serve to clarify the background of the proposal and include impact assessments of some form.²

The consultation report serves two objectives. One objective is to present and summarise consultation. This gives the members of parliament an idea of who said what and what the different arguments in favour or against the draft or parts of the draft are. Another objective is to present and summarise the ministry's reactions to consultation comments. These reactions show whether and to what degree the administration listened to the remarks from outsiders. The ministerial responses reveal if a specific remark from a consultation partner has (and if so, how) or has not been accepted in the further drafting of the bill. Systematically going through the ministerial responses to comments from consultation partners, looking in detail at the legal changes suggested in every single comment, allows us to construct an image of the impact of consultation: how amenable was the bureaucracy to advice given by external actors? This content analysis (Neuendorf, 2002: 1) is at least partially inspired by the method applied by Binderkrantz et al. (2014) and leads to an approach in four steps, which will be elaborated below.

Step 1: Collecting the data and establishing an overview

The first step of the analysis was to gather data, i.e. to collect a reasonably large sample of consultation reports. Nearly all reports are publicly available via the Danish parliament's website; analysing each report, however, is a big task as it requires a legal examination of every single comment and response. The challenge, then, was to construct a dataset large enough to grasp the breadth of government branches but still manageable when it comes to analysis.

The sample therefore consists of every available consultation report from the parliamentary session of 2013/2014, i.e. from October 2013 to September 2014. It is the total amount of data available within the chosen timespan. The period was chosen on the background of three criteria. First, it should be recent enough to allow for a complete data collection, i.e. well within the 'digital age'. Second, it should not be a timespan including an election as this might distort the findings through excess politicisation. Finally, it should be long enough to exclude systematic variation in the timing of certain proposals and biases in the administrative origin of those. This sampling provided a total of 184 consultation reports, all systematically presenting and commenting on remarks from external actors.

The sample lives up to the first criterion as every proposal and every consultation report from the year is digitally and publicly available. It also lives up to the second criterion, as it did not coincide with a local or general election, and to

the third, as it represents the whole of the government's different branches and their workflow throughout an entire year.

However, regarding the second criterion some additional remarks are necessary. While the period did not coincide with either a local or general election, it did include a realignment of the government in which one party of the incumbent three-party coalition left office. As the sample only represents one parliamentary session, it cannot be used to consider how different government coalitions might influence the administration's amenability. This paper therefore allows for generating expectations on the (potential) relationship between government characteristics and administrative amenability but not for systematic research on that matter. This might weaken the research design, as the colour of the government coalition or the relative strength of the government might be relevant to include. This more political dimension is, however, an interesting research step beyond the scope this paper, which focuses on the administration.

The argument for the exclusion of the political focus in this paper centres on the bureaucratic nature and long history of the consultation procedure in Denmark. Consultation is the default position disregarding the colour and strength of the government. Consultation is thus fairly independent of, say, government ideology unless a specific government pledges to be more amenable. That was in fact the case of the government under scrutiny in this analysis: it vowed to prolong consultation deadlines (Regeringen, 2011: 76). This, by the way, only supports the sampling as the investigation not only focuses on a state with a tradition of consultation, but also on a specific government, which promised to strengthen the institution of consultation: all the more reason to expect a result showing a high degree of amenability.

Step 2: Categorising the ministerial responses

The second step was the main part of the analysis. The ministerial reports all list a number of legal consultation comments to which the administrations respond. Those ministerial responses were all categorised in the simplest way possible as shown in Table 1. This coding implied a legal analysis of every single ministerial comment: what has been changed and how?

Table 1: Scheme for categorising ministerial responses in consultation reports

Value	Category; ministerial response was
-1	Rejective
0	Amenable but not leading to change in the proposal
1	Amenable and leading to change in the proposal

The method is to some extent similar the one applied by Binderkrantz et al. (2014), but the coding applied here is more detailed. The approach is a legal analysis of the text: what specific legal changes are implied in the consultation report? The coding made by Binderkrantz et al. (2014) focuses on whether a

group has exercised influence or not; this leads them to code at a more general level than here as they focus on the interest groups' consultation letters rather than on the legal specificity of the different comments in these letters.

The dataset constructed here consisted of a vast number of ministerial responses that were all given a score related to their degree of amenability. The method of scoring was deliberately kept as simple as possible as any further nuancing of the numbers would entail a very high degree of interpretation, thus harming both the reliability and the validity of this exercise (Adcock & Collier, 2001).³

The handling of the ministerial remarks and the data thus constructed, however, demand a few further words. First, it is worth noticing that the analysis is concentrated on categorising the ministerial responses. Remarks that were not described in the consultation report do not fall within the scope of this analysis. One cannot exclude the possibility that the ministry takes certain remarks into account without mentioning this in the consultation report. It is, however, unlikely. It is more likely that the remarks not described by the ministries in the reports are the one the administration reject and do not find necessary to comment on. This interpretation is supported by the fact that several of the reports include statements of exactly that. This would leave us overestimating the degree of amenability.

Second, only consultation remarks with a demand or proposal for change have been categorised. Therefore, plain positive remarks have been excluded. Comments representing a pure positive view of the draft proposal under consultation cannot be the source of change; they thus cannot be categorised as foreseen and described in Table 1. Another issue concerns the comments that are questions on how to interpret certain elements of the legal text. Consultation remarks taking the form of interpretative questions are hard to handle. When exactly is an interpretative question a mere question and when is it a subtle demand for a redrafting of the text? The answer to this puzzle is often given by the consultation partners themselves: when asking legally interpretative questions, they stress the need for clarification of the text and sometimes even suggest how to do so. It happens in the reports that the ministries answer these kinds of interpretative questions, i.e. explain how to legally understand the text. These cases have been categorised as 'rejective' as the fulcrum of the consultation remark was a need for clarification in the legal text – not in the consultation report. That the consultation partners wish for this and that the administration is more reluctant to do so, is obvious: the text of the proposal will become legally binding; the consultation report will not.

Third, a ministerial response can address several consultation remarks and likewise the same point can be made by different consultation partners. In these cases, the response has only been categorised once; an article in a law is not changed five times if five consultation partners point to the same problem: it is only changed once.

This second step of the analysis thus resulted in a database of ministerial responses and categorisation hereof distributed by consultation reports/law pro-

posals. For every proposal the ministry was also noted, allowing for the calculations of average scores as described in the next subsection.

Step 3: Calculation of average scores

Every single consultation report consists of numerous specific ministerial responses to legal remarks given by consultation partners. When step 2 of the analysis was concluded, these specific responses had been categorised as foreseen in Table 1. From a legal perspective or when analysing a specific bill in detail it is, of course, interesting to see if a specific consultation comment has been accommodated. But to obtain a broader idea of the degree of administrative amenability, we also need a picture at a more general level.

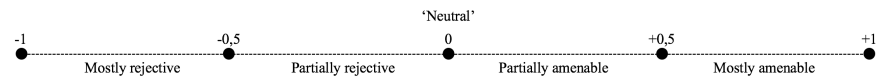
Thus, the next step was to calculate an average value of the scores given to the comments in an entire consultation report. How much did the ministry – all in all – listen when conducting the consultation on a given draft law? This average score gives us an idea of whether positive or negative responses flourished and of how much they did so relative to each other. A near-zero average value of amenability of a given consultation report indicates that the ministry in this case listened as much as it rejected, whereas a value close to -1 indicates a rejective report, and a value close to 1 indicates a report with a high degree of amenability.

As the ministry was noted as well, a further step was – based the scores of consultation reports written by the respective ministries – to calculate a general average score of amenability of the different ministries. This makes a ranking of them possible. Which of the ministries have a culture of listening to consultation partners in this process of public consultation and which do not? Two caveats are important here: first is that the number of law proposals and thus consultation reports vary among the ministries. When calculating an average score of a ministry based on few consultation reports – as is the case with for instance the Ministry of the Church (1), the Ministry of Defence (2), the Ministry of Foreign Affairs (3), the Ministry of Housing, Rural and Urban Affairs (5), and the Ministry of the Climate and Energy (5) – a single consultation report makes a great difference to the general average score of the ministry. The lower the number of consultation reports in the calculation of the general average score of a ministry, the greater the importance of arbitrary differences due to, for instance, idiosyncrasies of the specific person conducting the consultation and writing the report, or special political circumstances concerning amenability in a specific case. Second is that the analysis only covers one year. Despite no reason to believe that this year is not representative and despite the great number of specific legal comments analysed in detail – the consultation reports vary from a few to 95 pages – the general conclusions on ministerial level are less strong than those on the specific bills / reports.

At this point it is worth recalling that the average amenability scores of both specific bills and more general of ministries are based on categorisations of the ministerial responses, i.e. an essentially legal analysis. This implies that the specificity of the analytical results is dependent on the interpretations made by

this author. In order not to overdo them, the average scores were re-structured into four broader categories as shown in Figure 1. This lowering of the level of detail in the use of the data is done to make the conclusions more valid and recognisable to practitioners.

Figure 1: Reordering of data into four categories



Step 4: Categorising the amenable responses: technical or substantial?

The analysis so far can show the extent to which the administration accepts changes proposed by consultation partners. It cannot, however, say anything about the nature of the changes. And that is relevant too: are the changes made substantial? Or do the ministries prefer to listen to less important and more 'technical' remarks from consultation partners? Also investigating the Danish consultation system, Binderkrantz et al. (2014) emphasise how some interest groups are more influential in certain domains than others, but they do not investigate the nature of the changes, only if they reflect the desires of a certain interest group. However, if the aim is to investigate policy learning as a source of output legitimacy – as is the case here – the nature of the changes is important.

To do so, it is necessary to dig deeper into consultation remarks that the ministries find relevant enough to be the source of alterations of the law proposals.

To investigate these, all the cases of amenability, i.e. all the cases in which a response was given the value 1 at step 2 in the analysis, were analysed further from a legal perspective. This was done to conclude whether a remark led to a substantial change by removing or adding something to the bill that it was not originally intended to include or exclude, or whether it only led to a technical change (such as a clarification rather than adding or removing elements). This analysis was heavily dependent on a legal-dogmatic reading (Wegener, 2000) of the remarks and the bills.

The former parts of the analysis were all dependent on a certain degree of interpretation; this latter part is even more so. Reliability and validity of this step might therefore not be at the same level as the rest of the investigations presented in this paper. However, as shall be shown below, the results were so clear that the conclusion would probably not change even in the event of a bias of some sort.

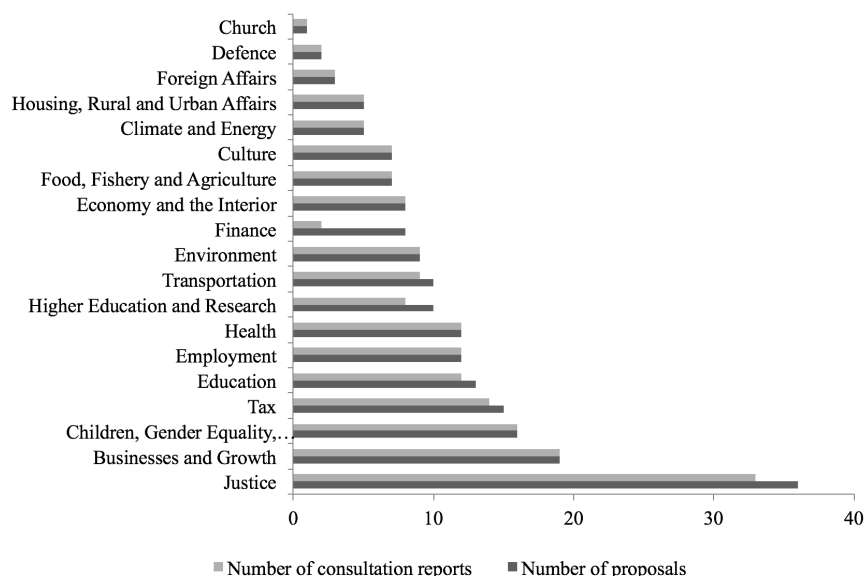
Results

On the background of the considerations of method presented above, the 184 consultation reports were analysed. This section presents the results of this four-step investigation.

Step 1: The data overview

The sample consists of 184 consultation reports representing all ministries in the government except the Prime Minister's Office. Consultation reports are written for almost every single law in Denmark, cf. Figure 2.

Figure 2: Law proposals and consultation reports



The first impression of the above figure has two aspects to it. The first is that consultation is a widespread and very strong norm across the administrative landscape; consultation reports exist for nearly all laws debated in parliament: 93 per cent of the bills proposed in the parliamentary session of 2013/2014 were accompanied by consultation and consultation reports. The only notable exception is the Ministry of Finance, which presented eight laws before parliament in the period. Of these, only two were accompanied by consultation reports. This exception is hardly surprising as budget laws are generally not sent out for public consultation in Denmark. This finding – that consultation is widespread – is also hardly surprising given the ‘decline of corporatism’ (Rommetvedt et al., 2013). Following Binderkrantz et al. (2014: 884) ‘consultations have, to some extent, replaced corporatism’ in otherwise traditional corporatist Denmark.

The second aspect of this first step of the analysis is that the number of consultation reports and law proposals vary among the different ministries. At one end of the scale, we find the Ministry of Justice with 36 law proposals and 33 consultation reports; at the other end, we find the Ministry of the Church with one law proposal and one consultation report. Thirteen ministries made consultation reports on every single law proposal they presented. These represent very different branches of the government administration and this only supports the

first finding that the consultation system is broadly recognised and used – a very strong norm across the Danish government administration despite it not having a strong legal basis. This strengthens the expectation to find a large number of ministerial responses being amenable to consultation comments.

Steps 2 and 3: Categorising the ministerial responses and calculation of averages

At this step, the specific ministerial responses to comments referred to in the consultation reports were all classified according to the logic presented earlier. This was done for all 184 consultation reports. However, four reports did not include any substantial comments from consultation partners. The results shown in this section are therefore only for the 180 remaining reports.

When looking at the average scores of the consultation reports, it is striking that the bulk of them are mainly rejective. 83 percent of the 180 reports show average amenability scores below zero; and almost a third of them have an average score below -0.5 leading to a classification as ‘mostly rejective’. The results are summarised in Table 2.

Table 2: Summarising average amenability scores for consultation reports

Description	Score	Number	Percentage
Mostly amenable	Above 0,5	3	2 pct.
Partially amenable	From 0 to 0,5	18	10 pct.
‘Neutral’	0	10	6 pct.
Partially rejective	From 0 to -0,5	90	50 pct.
Mostly rejective	Below -0,5	59	33 pct.
Total	–	180	100 pct.

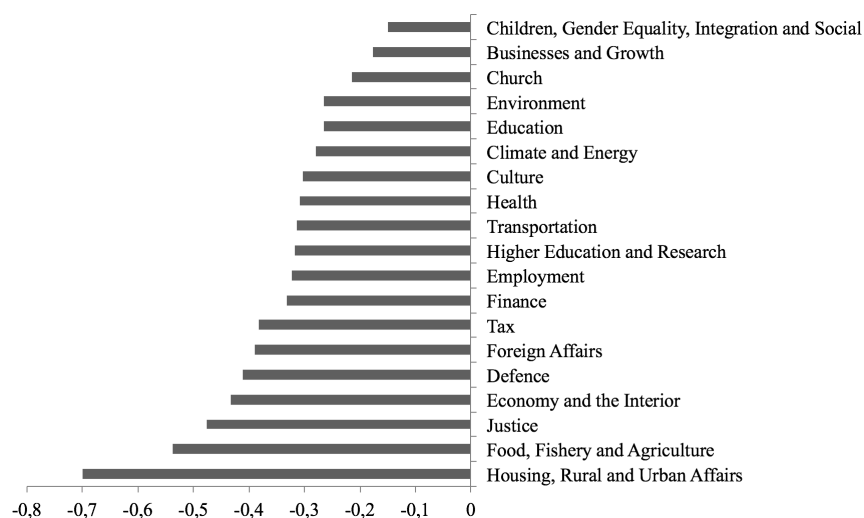
Rejections take many forms, from the very thorough and substantial to the more superficial statement of disagreement with the consultation partner. It also happens that the consultation remarks are rejected without the substance being scrutinised at all.

This is a result that deviates from previous studies and expectations. Binderkrantz et al. (2014: 886) suggest an amenability rate in the Danish consultation system of 47 percent. Differences in sampling might explain some of this deviance but this author would also suggest two other things that led Binderkrantz et al. (2014) to overestimate amenability. First, they apply coding categories that can be hard to distinguish between. When is a consultation comment ‘fully or almost fully’ met and when is it merely ‘partly’ met? Second, their definition of ‘group responses’ seems cruder than the one suggested by the legal method applied here. They seem not to distinguish between the often many different comments made in a single consultation letter: if a letter from an interest group includes, say, five (legal) comments but only one is met, has the administration then been amenable towards that group? Handling this question obviously af-

fects the measure.⁴ Moreover, the measure constructed here is by design a conservative one that most likely overestimates amenability as comments not included in the ministerial consultation reports are not analysed. If the results here are by design too positive, and if they show a considerable lower degree of amenability than the one found by Binderkrantz et al. (2014), it would not be stretching it to conclude that their results are overly optimistic when it comes to amenability in the Danish consultation system.

The impression from Table 2 is that rejection is by far the most common answer to consultation remarks. This picture is found across different ministries but to varying degrees. In other words, there is no such thing as an amenable ministry but definitely there is such a thing as a rejective ministry. The average scores of the consultation reports of the respective ministries are shown in Figure 3.

Figure 3: Average scores of consultation reports of ministries



The Ministry of Housing, Rural and Urban Affairs had the lowest average amenability score. However, as mentioned in the method section’s description of step 3, the scores of ministries with very few consultation reports are more prone to random error than those with many proposals. The Ministry of Housing, Rural and Urban Affairs is exactly such a case; it presented only five bills in the parliamentary session under scrutiny.

Ministries which presented more than five bills and yet came out with a low average score of amenability are, for instance, the Ministry of Justice and the Ministry of Food, Agriculture and Fishery. These both have average amenability scores just below and just above -0.5. In particular, the Ministry of Justice – with its great number of proposals and consultation reports – is a case where arbitrary factors are hardly an explanation for the systematic rejections given by this ministry.

A natural topic of discussion, then, is how to explain the strong but differentiated bias towards rejection in the administrations' responses to consultation remarks. The analysis itself does not offer an answer to this question on why the bureaucracy does not listen as much as one might expect in a country like Denmark. However, this author dares to suggest two explanations. First, a general strengthening of informal structures of inclusion on the cost of formalised structures; and second, certain and diverging administrative cultures.

A general weakening of formalised mechanisms of inclusion, the 'decline of corporatism' mentioned earlier (Christiansen & Rommetvedt, 1999; Rommetvedt *et al.*, 2013), could explain the general tendency to reject. This, however, would only be the case if consultation had not filled the gap left by the decline of corporatist structures opposite to what Binderkrantz *et al.* (2014: 884) suggest. If the administrations across the government branches tend to shift from formal towards informal involvement of stakeholders, what is left for both the classical corporatist forms of involvement and the formal consultation are the areas in which agreement could not be obtained informally. This would mean a bias towards rejection in the analysis, exactly as found.

Such an effect – a general weakening of formalised structures – might be part of the explanation for the results found, but it is in the eyes of this researcher hardly a full explanation. Two reasons support this. First, a full-blown shift away from formalised consultation would render the consultation institution an archaic and purely bureaucratic exercise. If that was the case, it could hardly attract as much energy from political actors, the media, the administration and the consultation partners as we witness. Second, one would expect the rejection bias to be more equally distributed among the ministries in the data. This is also a point that nuances the findings of Binderkrantz *et al.* (2014): they suggest that organised interests are more influential on their own turf. The results here would suggest that this is also partially explained by differences within the ministries, not only by different group resources or the like.

Weakening of formalised structures would explain some of the rejection bias but leave a fair proportion to be accounted for by other factors, such as administrative culture. Some ministries have cultivated inclusion and amenability, others have not. Whether this is the case cannot be established here, but is a topic for further research. And the relative weight of the two explanations cannot be established in this paper, but it is hardly unreasonable to propose that it differs among the ministries and ministerial subdivisions: in some bureaucracies, the rejection bias is explained mainly by culture, in others by irrelevance of the formalised consultation structure. Despite corporatism backing off relative to other structures of involvement, it has not been fully replaced by consultation everywhere.

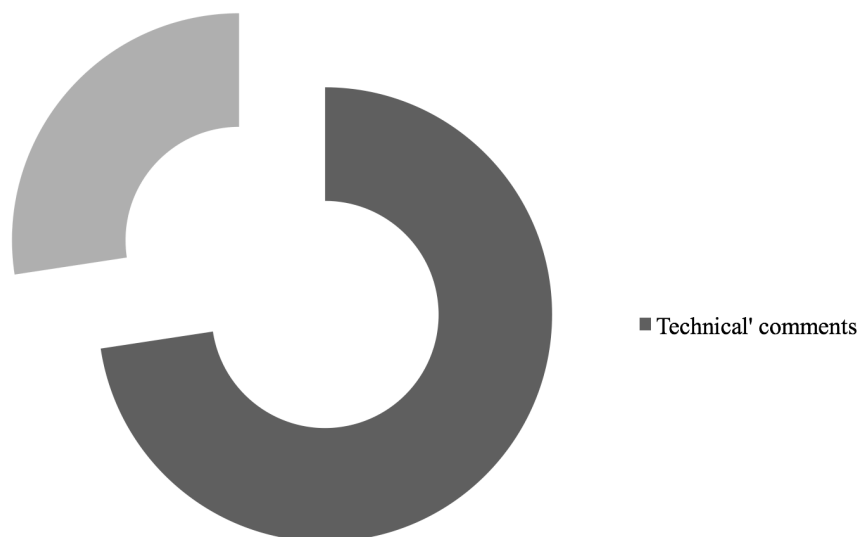
Step 4: Categorising the amenable responses – technical or substantial?
Steps 2 and 3 indicated that the claim that consultation is an effective source of quality control on legislation is exaggerated. The value of the remarks made by

consultation partners is at best rather scarcely distributed. Consultation, then, can hardly add as much to output legitimacy.

It could be the case, however, that the ministries tend to listen where things matter the most and a way to investigate this is to go through the amenable responses in the consultation reports. What is the subject matter in question? Is the comment from the consultation partner something that alters the original legal and political intention of the bill or is it a mere act of clarifying the existing intentions?

This exercise is more speculative as the dubbing of a matter ‘technical’ or ‘substantial’ is very dependent on the legal interpretation of both the draft legal text and the consultation remark. But even when taking these caveats into account, the conclusion when looking at the data is rather unambiguous: the consultation remarks that the ministries take into account are mainly of a ‘technical’ nature, cf. Figure 4. On average, consultations seem not to add substantially to the content of laws.

Figure 4: ‘Technical’ and ‘substantial’ among the comments complied with by ministries



This, however, might not be surprising as complying in situations with minor conflict potential is obviously easier. This is a parallel to the situation of rule simplification where reregulation is easier than deregulation (Pedersen & Pasquali, 2009). In addition, despite their lesser ability to change the draft law, these technical remarks do in fact play a role in making that law more comprehensible to regulators and regulatees and thus to effective functioning and in the end to output legitimacy. Also, this finding can serve to nuance the existing literature on influence of interest groups: a group might have great influence – but on what kind of matters?

Conclusions: Listening but not listening

This paper focused on consultation as a potential source of output legitimacy. The assertion was that if consultation is to lift this task adequately, it must have a certain degree of impact. The Danish consultation system was chosen as a most-likely case when it comes to amenability: it was expected to be the source of a high number of changes to draft laws. The examination of this was done through a legal analysis of 184 consultation reports – every consultation report written in the parliamentary session of 2013/2014 – focusing on whether the ministerial responses to consultation remarks were rejective or amenable. The picture thus constructed revealed that the Danish administration is not listening as much as one might expect, at least in a general sense. This conclusion points in a rather different direction than the assertion of Binderkrantz et al. (2014: 884) that ‘there’s clearly something to be gained from participating in consultation’.

Departing from this general impression and turning back to the discussion of consultation as a potential source for strengthening output legitimacy, it seems clear that the simple argument of the double role of consultation presented is in need of nuancing. Consultation may strengthen output legitimacy, but its use only allows for this in a limited sense. The Danish administration tolerates input but it does so in a repressive manner where only a few comments are used to make laws better and where the majority of remarks accepted in the further drafting of a law are viewed as ‘harmless’ technical input. These technical inputs do of course add to, for instance, the effectiveness or the clarity of laws, but they can hardly be thought of as a source of (policy) learning.

Despite this general picture – no ministry complied to a higher degree than it rejected – considerable differences between the different government branches exist. The average score of the five bills proposed by the Ministry of Housing, Rural and Urban Affairs was -0.7, whereas the average score of the 16 bills proposed by the Ministry of Children, Gender Equality, Integration and Social Affairs was -0.15.⁵ The general picture of consultations not contributing positively to the content of laws is thus a simplification.

These conclusions have further implications: Denmark was chosen as a case as the country’s administration is often hailed for its transparency and inclusion of societal actors. This, however, has now been shown to be more formal than substantial. If that is the case in Denmark – where inclusion would most presumably be substantial – it does not seem unfair to assume that consultation and similar institutions in other countries with weaker traditions of inclusion also do not bring about that much change and thus cannot add much to output legitimacy.

‘I am grateful for the sharpest of criticisms, as long as it remains factual’,⁶ German statesman Otto von Bismarck once remarked; this is also the thought behind the Danish consultation system – behind every consultation system – but much would suggest that this perception might not be heralded as highly as it could or perhaps even ought to be.

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Notes

¹ Clearly, the weight of effective delivery of output relative to input factors such as, say, representation in the total equation of legitimacy will vary. In certain policy fields, however, it must be expected that the weight of output is high. Regulation is perhaps one such field (Pedersen, 2016a), security is another (Pedersen, 2015).

² It is thus not completely correct right when Radaelli notes that ‘[c]alculations of costs (...) do not end up in a final document summarizing the net impact of proposals.’ (2009, 1153–1154). It is true that these calculations do not follow a rigorous scheme and they are often rather superficial (of the reasons given by Radaelli 2009), but they do exist and they do end up in a final public document – and legally speaking actually a rather central one.

³ Ideally, this exercise was undertaken through blind coding as Krippendorff (2008) and Neuendorf (2002) suggest; however, there might be a potential trade-off between the training needed to apply this legal-oriented coding scheme and the desirable blindness: the more training, the more you see, so to speak. This researcher thus chose to code alone but to have two lawyers go through the coding of random examples in order to secure the quality of the research.

⁴ This problem, however, has no influence on their conclusion as they seek not to study the functioning of the system but to study the relative influence of different groups. Even if the overestimate amenability – as I would suggest they do – their conclusions (that business groups are more influential but only in certain policy domains) may still be valid.

⁵ In the dataset, this ministry has been treated as one institution, although it was the object of an organisational change due to a restructuring of the government in early 2014. The organisational – and political – change seems to have affected the average amenability score of the ministry's proposals (from -0,32 to -0,04). This suggests – at least in a preliminary way – that a political variable is relevant when studying amenability.

⁶ 'Ich bin dankbar für die schärfste Kritik, wenn sie nue sachlich bleibt.'